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IN THE

# Supreme Court of the United States

October Term, 1979.

## No. 79-343.

SUN SHIP, INC.,

*Appellant,*

*v.*

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH C. KIMMEL and WILLIE MOORE,

*Appellees.*

On Appeal From the Commonwealth Court of Pennsylvania.

# BRIEF FOR THE APPELLANT.

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*Appellees.*

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

## BRIEF FOR THE APPELLANT.

### OPINIONS BELOW.

The opinion of the Commonwealth Court of Pennsylvania (J. S. App., pp. A1-A10) is officially reported at 41 Pa. Commw. 302 and unofficially reported at 398 A. 2d 1111. The opinions of the Pennsylvania Workmen's Compensation Appeal Board (J. S. App., pp. A18-A53) and the referees' decisions (J. S. App., pp. A54-A72) are not reported.

## JURISDICTION.

The order of the Commonwealth Court of Pennsylvania was entered on March 16, 1979. (J. S. App., pp. A8-A10). Appellant Sun Ship, Inc. filed petitions for allowance of appeal from this order with the Pennsylvania Supreme Court which were denied by that court on June 4, 1979. (J. S. App., pp. A11-A15). On July 19, 1979 Sun Ship, Inc. docketed a notice of appeal to this Court with the Commonwealth Court (J. S. App., pp. A16-A17 and filed its Jurisdictional Statement on August 31, 1979. Probable jurisdiction was noted on January 7, 1980.

The jurisdiction of this Court rests upon 28 U. S. C. § 1257(2) because this appeal draws in question the validity of the application of the Pennsylvania Workmen's Compensation Act as being repugnant to the Constitution and laws of the United States, and the decision of the Commonwealth Court is in favor of the validity of the application of the state statute. *Huron Portland Cement Co. v. City of Detroit,* 362 U. S. 440 (1960); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282 (1921).

## CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Art. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.



2. United States Constitution, Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 2(3), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 902(3):

> When used in this chapter—
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

4. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 903:

> COVERAGE.
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an em-

ployee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

> (1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.
>
> (b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

5. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 905(a):

> EXCLUSIVENESS OF LIABILITY.
>
> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.



6. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, § 1 (Purdon):

> SHORT TITLE; APPLICATION OF ACT.
>
> That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by section 305.2.

## QUESTION PRESENTED.

Whether the Pennsylvania Workmen's Compensation Act is repugnant to the Supremacy Clause or the Admiralty Clause of the United States Constitution when applied to permit the exercise of jurisdiction thereunder over a claim for an injury to a maritime worker which falls within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

## STATEMENT OF THE CASE.

This appeal involves five workers' compensation claims filed under the Pennsylvania Workmen's Compensation Act (the "Pennsylvania Act") [1] for alleged disfigurements sustained by the claimants while employed by Sun Ship, Inc. ("Sun Ship"). Sun Ship is a company engaged in shipbuilding and ship repair at its yard located on the Delaware River, a navigable water of the United States, in Chester, Pennsylvania (App., pp. 7a, 11a, 20a, 24a). At the time of injury, each of the five claimants was employed at Sun Ship's yard and was engaged in shipbuilding or ship repair activity (App., pp. 7a, 11a, 20a, 24a, 28a). Each of the injuries occurred after November 26, 1972, the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (the "Longshoremen's Act") [2] (App., pp. 7a, 11a, 20a, 24a, 28a). It was undisputed that all of the claims involved here are within the coverage of the Longshoremen's Act.

Each claimant, nevertheless, filed a claim under the Pennsylvania Act, rather than the Longshoremen's Act,

1. Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*, Pa. Stat. Ann. tit. 77, § 1 *et seq.* (Purdon).

2. Act of March 4, 1927 ch. 509, 44 Stat. 1424, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251, 33 U. S. C. § 901 *et seq.*



and was awarded benefits. Sun Ship sought dismissal of each state claim on the ground that the claimant's exclusive remedy was the one provided by the Longshoremen's Act, particularly in view of the 1972 amendments to that Act which plainly evidenced Congress' intent to preempt state law (App., pp. 10a, 14a, 22a-23a, 27a, 31a).

The Commonwealth Court, an intermediate appellate court of Pennsylvania, concluded that the Longshoremen's Act unquestionably applies to each of these cases.[3] Despite this conclusion, it held that benefits could be awarded under the Pennsylvania Act because jurisdiction under the state and federal statutes is concurrent. 41 Pa. Commw. 302, 398 A. 2d 1111 (J. S. App., pp. A1-A10). The Supreme Court of Pennsylvania denied Sun Ship's petitions for allowance of appeal from the decision of the Commonwealth Court (J. S. App., pp. A11-A15), and thereafter Sun Ship filed its appeal in this Court (J. S. App., pp. A16-A17).

3. Pursuant to the Pennsylvania Act, these claims were initially heard by referees. In *Fields*, the referee held jurisdiction under the Longshoremen's Act to be exclusive and dismissed the claim. (J. S. App., pp. A58-A60). The referee in the other four cases awarded benefits, finding concurrent jurisdiction. (J. S. App., pp. A54-A57, A61-A72). All five cases were appealed to the Pennsylvania Workmen's Compensation Appeal Board which reversed *Fields* and affirmed the other cases. (J. S. App., pp. A18-A53). Sun Ship filed petitions to review the Board's orders with the Commonwealth Court.

## SUMMARY OF THE ARGUMENT.

When Congress enacts constitutionally valid legislation which is intended to cover a field completely, the states are precluded from enacting or enforcing statutes governing the same field by virtue of the Supremacy Clause of the Constitution. Art. VI, cl. 2. This preclusive effect is even more forcefully felt when the federal legislation constitutes an exercise of Congress' paramount power to define the uniform maritime law pursuant to the Admiralty Clause of the Constitution. Art. III, § 2. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). This intent to occupy a particular field is found where the statutory language or legislative history of an Act of Congress evidences a pervasive and comprehensive plan of federal regulation; where the legislation under review affects an area imbued with a dominant federal interest; or where the object and character of the congressional enactment reveal a purpose to occupy the field. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Even when Congress has not totally foreclosed state regulation, if state law conflicts with a valid federal statute or if the operation of the state law frustrates the achievement and implementation of a congressional purpose, the state law must yield to the superior command of the federal statute. *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978). The 1972 amendments to the Longshoremen's Act embody a clear congressional intent to preempt state law in the field of maritime workers' compensation; to permit state law to operate would frustrate the congressional purpose.

The legislative initiative in 1972, which represented the first major overhaul of the Longshoremen's Act since its enactment, was made in the context of the settled principles that the nature of the maritime law demands national uniformity and that Congress has the paramount power to



determine what the content of that uniform maritime law will be. Within this field of uniform maritime law, the states may not trespass. *Southern Pacific Co. v. Jensen, supra.*

Federal power in admiralty extends over both maritime torts and maritime contracts. Admiralty jurisdiction in tort is traditionally limited by geography, while admiralty contract jurisdiction encompasses the whole range of agreements affecting navigation, commerce and business of the sea. *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223-24 (1969). The language of the 1972 amendments makes clear that Congress was exercising its admiralty power in both tort and contract to create a uniform national system for maritime workers' compensation preemptive of state law.

First, Congress substantially broadened the definition of the term "navigable waters of the United States" in Section 3(a) of the Act and thereby brought within the Act's coverage injuries occurring upon land areas adjoining the actual navigable waterway including locations and facilities where longshoring and shipbuilding activities traditionally take place. Second, the 1972 amendments defined the persons covered by Section 2(3) of the Act to include all longshoremen and harbor workers specifically including ship repairmen, shipbuilders and shipbreakers. Finally, Congress deleted the "may not . . . validly be provided by State law" limitation on the Act's coverage contained in the original statute, thereby eliminating language which both reflected and contributed to considerable confusion about the availability of federal and state compensation remedies at or near the water's edge for many years. *See, e.g., Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962). It was this language, in combination with the "maritime but local" exception developed in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922), to mitigate

*Jensen's* perceived harshness, which had created the insoluble jurisdictional dilemma in early cases decided under the original Longshoremen's Act. This Court attempted to resolve the dilemma with the "twilight zone" doctrine in *Davis v. Washington Department of Labor and Industries*, 317 U. S. 249 (1942), and later in *Calbeck v. Travelers Insurance Co., supra,* which was read as creating an area where federal and state jurisdiction were concurrent. The difficulties persisted landward of that line, however, until *Nacirema Operating Co. v. Johnson, supra,* in which this Court denied recovery under the Act to a longshoremen injured on land.

It was this resolution of the problem in defining the line between state and federal coverage which Congress rejected when it expanded the Act's coverage landward in 1972. Only by deleting the "may not . . . validly be provided by State law" limitation from the amended Act could Congress assure itself that the comprehensive remedy set forth in the 1972 amendments would be uniformly applied both seaward and landward of the *Jensen* line. When these three amendments are read in conjunction with other provisions of the Act which provide that the federal remedy is both mandatory and exclusive for all claims within the Act's coverage, Congress' intent to preempt state law is plain.

Congress' intent to preempt state law is further evidenced by the legislative history to the 1972 amendments, wherein the Committees considering the legislation stated their concern that the benefits payable to an injured maritime worker "should not depend on the fortuitous circumstances of whether the injury occurred on land or over water." Moreover, the Committee Reports recognized that the inadequacy of benefits under the laws of most states would result in disparity of treatment among maritime workers of the same employer "if State laws are permitted to continue to apply to injuries occurring on



land." Thus, each Committee concluded, "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972); H. R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972).

The historical dominance of the federal interest in maritime matters in general and compensation for employment-related injuries for maritime workers in particular also supports the finding that state law may not occupy this field concurrently with the Longshoremen's Act. When this dominant interest is expressed in a statute such as the Longshoremen's Act which completely defines the substantive law, the procedure and the remedies to be applied to claims covered thereby, the states are precluded from applying state law governing the same matters, even if that law is intended to complement or supplement the federal scheme. *Hines v. Davidowitz*, 312 U. S. 52, 66-67 (1941).

This dominant federal interest in providing a uniform compensation remedy for claims such as those before this Court, which are plainly covered by the Act, is not any less pervasive merely because the Act's coverage ends at some point landward of the water's edge. *See New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 153-54 (1917); *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 174 (1917). Congress has determined how best to compensate maritime workers for employment-related injuries and has provided a complete system for so doing; it is no longer open to the states to decide that this system is inadequate or to supplant it with their own compensation schemes for claims covered by the Longshoremen's Act.

Indeed, the very completeness of the Longshoremen's Act, in combination with the equally complete but sub-

stantially different scheme embodied in the Pennsylvania Act (and that of almost every state), means that conflicts will necessarily arise if concurrent jurisdiction exists as employers attempt to comply with the differing obligations and procedures imposed by the federal and state systems. Because such conflicts occur at almost every point where the Longshoremen's Act and the Pennsylvania Act speak to a particular issue, state law must be wholly displaced. Moreover, decisions since the 1972 amendments have shown that a theory of concurrent jurisdiction which allows claimants to elect state law remedies will stand as an obstacle to the accomplishment of Congress' purpose to provide an adequate and uniform federal remedy by precluding that claimant from pursuing his claim under the Longshoremen's Act. *Landry v. Carlson Mooring Service,* 9 BRBS 518 (1978). Thus, by every measure, the Longshoremen's Act as amended preempts state law, and Pennsylvania's exercise of jurisdiction over these compensation claims must be reversed.



## ARGUMENT FOR APPELLANT.

The Commonwealth Court concluded that Pennsylvania may constitutionally apply its workers' compensation law to afford claimants benefits thereunder even though each claim indisputably falls within the coverage of the Longshoremen's Act. The following sections of the argument will show that this holding is in error because it contravenes the plain intent of Congress to preempt state law with a uniform federal compensation system when it enacted the sweeping amendments to the Longshoremen's Act in 1972.

### I. The Supremacy Clause of the Constitution Precludes the States From Enforcing Legislation When Congress Preempts a Particular Field With Uniform Legislation National in Scope.

When Congress enacts legislation within its constitutional authority which is intended to cover a particular field completely, the Supremacy Clause of the Constitution, Art. VI, cl. 2, operates to deprive the states of the power to enact or enforce legislation governing that field, even when a state would be free to act absent federal legislation. The standards for determining when Congress intends to preempt a subject to the exclusion of state law are detailed in this Court's recent decision in *Ray v. Atlantic Richfield Co.,* 435 U. S. 151 (1978), *quoting Rice v. Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947):

> "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148. Or the Act of Congress may

touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U. S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Napier v. Atlantic Coast Line R. Co., supra.*"

Accord, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U. S. 624, 633 (1973).

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co., supra,* at 526, 540-541. Accord, *De Canas v. Bica,* 424 U. S. 351, 363 (1976).

435 U. S. at 157-58.

When the 1972 amendments to the Longshoremen's Act are analyzed against these standards, Congress' intent to preempt state compensation statutes is manifest. The principal source for determining congressional intent is the relevant statutory language. Analysis of the provisions of the Longshoremen's Act, as amended in 1972, is facilitated by briefly reviewing the relationship between the federal government and the maritime law which formed the basis for this legislative initiative in the field of maritime workers' compensation.



## II. The Nature of the Maritime Law Demands National Uniformity and Congress Has the Paramount Power to Determine What That Law Will Be.

In 1917 this Court decided the landmark case of *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917). In *Jensen* an employee of the railroad was killed while unloading cargo from a steamship owned by the railroad. At the time of his fatal injury he was on board the ship, which was berthed in the navigable waters of New York harbor. Jensen's widow and children were awarded benefits under New York's workers' compensation statute. In reversing the state court's confirmation of that award, this Court stated the rule of federal uniformity in admiralty and maritime matters in constitutional terms:

> And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

244 U. S. at 216.[4]

4. The *Jensen* court concluded that the need for uniformity in maritime matters was so great that even the federal remedy provided to railroad employees by the Federal Employers' Liability Act could not apply to the facts of *Jensen.* 244 U. S. at 212.

The source of this doctrine is the Admiralty Clause of the Constitution, which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." Art. III, § 2. *Jensen* further recognized that the development of the substantive law to be applied in this area of admiralty jurisdiction where national uniformity is required is not a matter solely for the federal courts. Under the Necessary and Proper Clause of the Constitution, Art. I, § 8, Congress has legislative authority over all powers vested in any department of the United States. Thus, the *Jensen* Court concluded, "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." 244 U. S. at 215.

These principles—the need for uniformity in the maritime law and Congress' supreme authority to state that law—have guided and determined the course of the law of compensation for maritime workers. When *Jensen* was decided in 1917, Congress had not exercised its authority to enact a uniform federal statute to provide a system of compensation for maritime workers, and no remedy of this type was available under the maritime law for longshoremen or harbor workers. The effect of *Jensen*, therefore, was to deny compensation to that class of maritime workers injured over the navigable waters for whom the principle of uniformity precluded the application of state law. The perceived harshness of this result led to a series of decisions which attempted to define limitations upon and exceptions to the uniformity principle, and thus provide a state compensation remedy to some of these amphibious workers. *E.g., Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922). The principle itself was never abandoned, however, despite persistent attempts to have *Jensen* overruled.

The second principle of *Jensen*, by contrast, was not limited by subsequent decisions. To the contrary, this



Court's decisions have consistently recognized that Congress has the power to extend the scope of the maritime law, as well as to modify the applicable substantive legal principles. *E.g., Gutierrez v. Waterman Steamship Co.*, 373 U. S. 206 (1963) (applying Admiralty Extension Act of 1948 to allow suit in admiralty for unseaworthiness for injuries caused by vessel to longshoremen working on the dock); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943) (holding Jones Act remedy available to seamen injured on land).

In two cases decided shortly before the passage of the 1972 amendments to the Longshoremen's Act, this Court invited Congress to exercise this authority to extend the reach of federal admiralty jurisdiction in the field of maritime workers' compensation. In both *Nacirema Operating Co. v. Johnson*, 396 U. S. 212 (1969), and *Victory Carriers, Inc. v. Law*, 404 U. S. 202 (1971), longshoremen injured on piers while loading or unloading vessels pursued federal remedies for their injuries.[5] However, because Congress had not exercised its legislative authority in admiralty to include these workers under existing federal legislation, the Court felt bound to deny federal remedies. The Court's opinion in each case confirms Congress' power to afford such remedies. As stated in *Nacirema*:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide

5. In *Nacirema*, the longshoreman sought compensation under the Longshoremen's Act, while in *Victory Carriers* the action was brought against the vessel for unseaworthiness.

> with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U. S. at 223-24.

In the same term as *Nacirema,* this Court reaffirmed the principle of national uniformity in the maritime law in *Moragne v. States Marine Lines,* 398 U. S. 375 (1970), which overruled *The Harrisburg,* 119 U. S. 199 (1886), by allowing an action for wrongful death under federal maritime law. The Court thus ended the anomalous situation which had developed whereby the representative of an individual who met his death beyond state territorial waters was afforded a uniform federal remedy under the Death on the High Seas Act, while the representative of an individual who died in the territorial waters of a state was relegated to the wrongful death statute of that state, as incorporated into the federal maritime law. *See Hess v. United States,* 361 U. S. 314 (1960); *The Tungus v. Skovgaard,* 358 U. S. 588 (1959). Thus, while the Court was unable to further the uniformity principle in *Nacirema* because of the perceived limitations in the original Longshoremen's Act, it did invoke that principle in *Moragne*:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. *Such uniformity* not only will further the concerns of both [the Jones Act and the Death on the High Seas Act] but also *will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country."* *The Lottawanna,* 21 Wall. 558, 575 (1875).

398 U. S. at 401-02 (citations omitted; emphasis supplied).



Against this background of the Court's affirmation of Congress' constitutional power to expand the scope of maritime jurisdiction and the uniformity principle embodied in decisions such as *Jensen* and *Moragne,* Congress passed the 1972 amendments to the Longshoremen's Act.

## III. The Language of the Longshoremen's Act as Amended Establishes a Uniform and Exclusive System of Compensation for Maritime Workers.

The 1972 amendments completely overhauled the provisions of the Longshoremen's Act to remedy several problems which had arisen in the Act's administration and to reform the judicial gloss of the Act which had developed since its enactment in 1927. *Northeast Marine Terminal Co. v. Caputo,* 432 U. S. 249, 260-62 (1977). For present purposes, the most significant problem addressed by Congress was the disparity which had developed as a result of limiting federal coverage only to those maritime workers injured seaward of the water's edge, thereby relegating the workers injured on land to state compensation remedies. *Id.* at 262-65. Congress' response to this situation

was direct: it extended the scope of the Act's coverage to include maritime workers injured on land.

First, Congress extended the coverage landward by broadening the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Longshoremen's Act § 3(a), 33 U. S. C. § 903(a). This expansion comports with the notion that maritime tort jurisdiction is "bounded by locality," *Nacirema Operating Co. v. Johnson,* 396 U. S. 212, 215 n. 7 (1969), but it also manifests Congress' power to define what that locality will be.[6]

The scope of the Act's coverage was also clarified by defining the entire class of persons covered by the statute:

> *The term "employee" means any person engaged in maritime employment, including* any longshoreman or other persons engaged in longshoring operations, and *any harborworker including a ship repairman, shipbuilder, and shipbreaker,* but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Longshoremen's Act § 2(3), 33 U. S. C. § 902(3) (emphasis supplied). These provisions establish a two-part test for coverage under the Act: a geographical test

6. Prior to 1972, § 3(a) defined navigable waters to include only the actual navigable waters and any dry dock. There can be no doubt that Congress' redefinition of "navigable waters," limited as it is to those areas on land where longshoring, shipbuilding and ship repair functions are performed, is within its legislative power in admiralty. *Dravo Corp. v. Maxin,* 545 F. 2d 374, 377 (3d Cir. 1976), *cert. denied,* 433 U. S. 908 (1977); *Sea-Land Service, Inc. v. Director,* 540 F. 2d 629, 636 (3d Cir. 1976); *see Northeast Marine Terminal Co. v. Caputo,* 432 U. S. 249 (1977); *Gutierrez v. Waterman Steamship Co.,* 373 U. S. 206 (1963).



("situs") and a nature of employment test ("status"), thereby departing from the original Longshoremen's Act which defined coverage solely in terms of situs. *P. C. Pfeiffer Co. v. Ford,* 100 S. Ct. 328, 333 (1979); *Northeast Marine Terminal Co. v. Caputo,* 432 U. S. at 264-65.[7]

This departure is significant in light of *Nacirema Operating Co. v. Johnson, supra,* where this Court rejected the suggestion that Congress intended the original Longshoremen's Act to extend to the limits of maritime contract jurisdiction:

> Respondents urge, however, that the 1927 Act, though it employs language that determines coverage by the "situs" of the injury, was nevertheless aimed at broader coverage: coverage of the "status" of the longshoreman employed in performing a maritime contract. We do not agree. *Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts.** But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one.

* The admiralty jurisdiction in tort was traditionally "bounded by locality," *De Lovio v. Boit,* 7 F. Cas. 418, 444 (No. 3776) (C. C. D. Mass. 1815) (Story, J.) (followed in *Insurance Co. v. Dunham,* 11 Wall. 1 (1871)), encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction "extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." *De Lovio v. Boit, supra,* at 444. *Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage for locality alone.* As the test indicates, however, the history of the Act shows that Congress did indeed do just that.

7. Each of the injuries in the claims before the Court occurred to an employee who satisfies the status test and who was employed at a situs covered by the Act. These jurisdictional facts are not in dispute here.

396 U. S. at 215-16 (emphasis supplied). By including the status test in 1972, Congress did not limit coverage under the amended Act to traditional notions of maritime tort jurisdiction. Rather, Congress incorporated concepts of jurisdiction over maritime contracts, which has never depended upon geographical limitations. Furthermore, the principles of uniformity and paramount congressional power in maritime tort law set forth in *Jensen* apply with equal force in maritime contract law; indeed, *Jensen* relied principally on contract cases in stating the principles. *E.g.*, *The Roanoke*, 189 U. S. 185 (1903). By defining the Act's coverage in terms of status, therefore, Congress strongly demonstrated its intent to vindicate the uniformity principle to its full extent.

Thus, the language enacted by Congress indicates its intent to exercise its paramount power to define the scope of the maritime law of the United States. Since it is the need for national uniformity in maritime matters expressed in the Constitution, as interpreted by cases such as *Jensen*, which forms the basis for this congressional power, the use of this language shows that Congress intended the Longshoremen's Act, as amended, to apply uniformly, and to the exclusion of state compensation laws, for all cases within its coverage.

The overall plan of the Longshoremen's Act further demonstrates that the remedy provided therein is intended to be comprehensive and exclusive. Section 3(a) of the Act states that "Compensation *shall be payable* under this Act" when the jurisdictional tests are met. 33 U. S. C. § 903(a) (emphasis supplied). Moreover, Section 4(a) declares that "Every employer *shall be liable for* and *shall secure* the payment to his employees of the compensation payable under sections 7, 8 and 9." 33 U. S. C. § 904(a) (emphasis supplied). This language is mandatory, and on its face permits no exceptions. An employer cannot discharge his obligations under the Act by concluding that an employee covered thereby can be compensated under state law. Nor can an employee or the authorities administering a state's compensation law withdraw an injury from the Act's coverage by invoking the state compensation remedy. It is inconceivable that the Congress which expanded federal coverage and made that coverage mandatory could have intended continued application of state compensation acts to undermine its efforts, yet that is exactly what the Commonwealth Court has attempted to do here.



Any notion that Congress could have intended this incongruous result is laid to rest by Section 5(a) of the Act, 33 U. S. C. § 905(a), which provides in pertinent part:

> *The liability of an employer* [to pay compensation under this Act] *shall be exclusive and in place of all other liability of such employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. (emphasis supplied)

This language does not support a construction limiting the remedy to *some* workers' compensation scheme, state or federal, or permitting election of a state or federal remedy, which then becomes the exclusive remedy in that particular case. To the contrary, upon securing the payment required by the Act, the employer's liability under the Act is the

only liability which exists. *See South Chicago Co. v. Bassett,* 309 U. S. 251, 256 (1940) ("For those employees who are entitled to compensation, the remedy under the Act is exclusive. § 5."). Congress' intent to preempt state law can hardly be more clearly expressed.

Claimants argue in their motion to dismiss or affirm that Section 5(a) cannot mean what it plainly says because that language was part of the Act prior to the amendments and was not held to preclude state compensation remedies in certain limited situations where the Act would have provided a remedy. (Motion of Appellees to Dismiss Appeal or to Affirm the Judgment Below, at 3-4). As discussed below at pp. 31-39, those decisions were the product of the confusion which had developed as a result of language in Section 3(a) of the original Act which was eliminated by the 1972 amendments and so cannot be relied upon to defeat Congress' purpose in amending the Act. More fundamentally, reliance upon pre-amendment cases to define the present meaning of Section 5(a) would violate basic canons of statutory construction.

When Congress amends an existing statute, the duty of the courts is to give the unchanged sections and the amendments a harmonious reading so that they do not conflict, even where that requires rejecting an earlier judicial interpretation of the unchanged language. *See Clark v. Uebersee Finanz-Korporation,* 332 U. S. 480 (1947); *Republic Steel Corp. v. Costle,* 581 F. 2d 1228 (6th Cir. 1978), *cert. denied,* 440 U. S. 909 (1979). In the case of the Longshoremen's Act, such harmony is only achieved by reading Section 5(a) literally, because that reading fully accords with Congress' intention to provide a uniform and mandatory federal compensation scheme for injured maritime workers. To hold that Congress anticipated continued application of a pre-1972 construction of the Act which implicitly modified the command of Section 5(a)



when the rationale for that construction was eliminated by the 1972 amendments "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation,* 332 U. S. at 489.

In short, careful analysis of the statutory language of the Longshoremen's Act, as amended, reveals that Congress was exercising its paramount power to define the maritime law of the United States as it affects injured maritime employees. Under the teaching of *Jensen* and *Moragne,* that law must operate uniformly throughout the United States, and the states are not free to undermine that uniformity when Congress has determined that the maritime law will apply. This principle of uniformity read in conjunction with the other language of the Act which makes the liabilities created thereunder mandatory and exclusive compel the conclusion that Congress has completely occupied the field of compensation for maritime workers for injuries within the Act's coverage, to the exclusion of state law.

## IV. The Deletion of the Language in Section 3(a) of the Original Longshoremen's Act Which Limited Federal Coverage to Injuries for Which the States Could Not Validly Provide a Remedy Further Demonstrates Congress' Intent to Preempt State Law in 1972.

Congress' intent to preempt state compensation laws is also demonstrated by the language which it deleted from Section 3(a) when it amended the Longshoremen's Act. Prior to 1972, this section provided in pertinent part:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if re-*

*covery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* (emphasis supplied)

In 1972 the italicized portion of this section was eliminated at the same time the definition of navigable waters was expanded. Congress thereby removed the only language which supported any argument that it had not exercised its full authority over maritime matters when the Act was originally enacted. Indeed, the meaning of the deleted proviso had troubled the courts for many years. *See Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 126 (1962). The importance of this deletion can best be understood by reviewing the development of the law of compensation for maritime workers from *Jensen* to the 1972 amendments.

**A. Between the Time of *Jensen* and the Passage of the Original Longshoremen's Act, This Court's Decisions Created Uncertainty as to the Nature of Congress' Paramount Power to Define the Maritime Law and the Scope of the Principle of National Uniformity.**

By the time *Jensen* was decided, workers' compensation statutes were generally recognized as an appropriate means of protecting workers from the losses caused by employment-related injuries. Since the effect of *Jensen* was to deprive a large body of maritime workers of this remedy, the decision was not met with favor, irrespective of the validity of its essential premise regarding the need for national uniformity in maritime matters. Congress quickly enacted a statute preserving state workers' compensation remedies to all maritime workers, including seamen. Act of October 6, 1917, ch. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920),



the statute was declared an unconstitutional delegation of federal power to the states.

In 1922 Congress again attempted to fill this void, by amending the judicial code to preserve state compensation remedies for all maritime workers except seamen. Act of June 10, 1922, ch. 216, 42 Stat. 634.[8] Again, this Court declared the act unconstitutional in *Washington v. W. C. Dawson & Co.*, 264 U. S. 219 (1924):

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co. v. Stewart.* Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act of April 22, 1908, c. 149, 35 Stat. 65) and thereby abrogated conflicting local rules. *New York Central R. R. Co. v. Winfield*, 244 U. S. 147.

264 U. S. at 227-28.

Congress responded to this suggestion in 1927 by enacting the original Longshoremen's and Harbor Workers'

8. The legislative history of the 1922 Act suggests that Congress perceived the need for uniformity in a way different from the *Jensen* court. H. R. Rep. No. 639, 67th Cong. 2d Sess. 1 (1922); *see Northeast Marine Terminal v. Caputo*, 432 U. S. 249, 257 n. 12 (1977). Congress sought uniformity for all maritime workers at a given port or shipyard, whether injuries occurred on land or over the water, while the *Jensen* court interpreted the Admiralty Clause as requiring national uniformity for all injuries within the maritime tort jurisdiction, which, at that time, was held to encompass only the navigable waters.

Compensation Act. Act of March 4, 1927, ch. 509, 44 Stat. 1424. In the ten years between *Jensen* and the Act's passage, however, the Court had already taken steps which, in the interest of providing a compensation remedy to injured maritime workers, had blurred the sharp line between the area of exclusive federal admiralty jurisdiction and the area where state law could constitutionally operate. It was this blurring which engendered years of difficulty in construing the scope of the Longshoremen's Act.

In *Grant Smith-Porter Ship Co. v. Rohde,* 257 U. S. 469 (1922), an employee of a shipbuilding company was injured while working on a partially completed vessel which was lying in the navigable waters at the company's yard. Recognizing that *Jensen* would appear to bring the case within the exclusive federal maritime jurisdiction, the Court nevertheless allowed recovery under a state compensation act because shipbuilding was a matter of local concern such that state regulation "would work no material prejudice to the general maritime law . . . ." 257 U. S. at 477.

Because of its importance in the development of jurisprudence under the Longshoremen's Act, the Court's reasoning in *Rohde* deserves special attention. By virtue of the Court's earlier decision in *Knickerbocker, supra,* 253 U. S. 149, no federal statute purporting to provide a compensation remedy for maritime workers existed at the time of *Rohde.* Nor did the general maritime law provide such a remedy. By contrast, the Court noted that "The injury [to Rohde] was suffered within a State whose *positive enactment* prescribed an exclusive remedy therefor." 257 U. S. at 476 (emphasis supplied). Moreover, both parties had contributed to the state's compensation fund and operated under its provisions.



This contrast prompted the Court to rely upon the holding in *Western Fuel Co. v. Garcia,* 257 U. S. 233 (1921), decided a few weeks before *Rohde,* wherein the Court concluded that the absence of a right of recovery for wrongful death under the general maritime law, *The Harrisburg,* 119 U. S. 199 (1886), allowed the application of state wrongful death statutes in an *in personam* admiralty action under a maritime but local analysis. The injury causing death in *Garcia,* however, occurred to a longshoreman unloading cargo located in the hold of a ship —the very type of accident involved in *Jensen.* The "local concern" allowed to defeat the uniformity of admiralty jurisdiction in *Garcia* was not related to the type of activity being performed (longshoring as opposed to shipbuilding) but rather to the state's express desire to provide a wrongful death recovery for deaths occurring within its territorial limits as opposed to the lack of a positive rule on the subject in the general maritime law.

Had a similar gloss been applied to *Rohde,* it, like *Garcia,* could have been read as permitting a state compensation remedy for all maritime workers injured in the territorial waters of the state until such time as Congress declared a uniform compensation remedy. The force of *Jensen* proved too strong, however, and, consequently, the maritime but local test in the compensation sphere became concerned solely with the nature of the work performed at the time of the injury. *See Baizley Iron Works v. Span,* 281 U. S. 222 (1930) (summarizing Supreme Court decisions after *Rohde* and distinguishing them on the basis of the nature of the work performed at the time of injury).

The confusion over the interface between state and federal maritime law over the navigable waters engendered by *Rohde* did not occur landward of the water's edge. In *State Industrial Commission v. Nordenholt Corp.,* 259 U. S. 263 (1922), the Court concluded that an injury to a mari-

time worker occurring on land, or an extension thereof, is covered by state law, relying upon the doctrine that the scope of maritime jurisdiction in tort depends solely upon locality. Thus, the Court chose not to adopt an exception to this doctrine for injuries on land (a "local but maritime" rule) as it had in *Rohde*, but the Court in *Nordenholt* recognized, at least implicitly, Congress' power to do so:

> The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In Jensen's case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antogonism exists. *There is no pertinent federal statute;* and application of the local law will not work material prejudice to any characteristic feature of the general maritime law.

259 U. S. at 276 (emphasis supplied).

**B. The Limitation on Coverage in Section 3(a) of the Original Longshoremen's Act Reflects Both a Desire by Congress to Fill the Gap in Coverage Created by *Jensen* and a Concern on Congress' Part as to the Scope of Its Legislative Power in Admiralty.**

With these decisions in mind, Congress enacted the Longshoremen's Act in 1927, which included the "if recovery . . . may not validly be provided by State law" limitation on coverage. On its face, this language would appear to indicate a congressional intent to provide a compensation remedy which only filled the gap in coverage created by *Jensen* as modified by *Rohde*, and, indeed, it was so interpreted for many years. *E.g., New Amsterdam Casualty Co. v. McManigal*, 87 F. 2d 332 (2d Cir. 1937).



The language could also be interpreted as reflecting Congress' apprehension that any attempt to exercise its admiralty power which covered those areas where state law could provide a remedy would be unconstitutional. In other words, Congress may have read *Rohde* and its progeny not only as defining the outer limits of the reach of state jurisdiction, but also the limits of federal maritime tort jurisdiction, such that the two were mutually exclusive.[9] While such trepidation on the part of Congress was probably unfounded, it was understandable given the strong voice with which this Court had spoken in admiralty cases since *Jensen* and its rejection of Congress' earlier attempts to provide a compensation remedy for maritime workers.

**C. The Limitation on Coverage in the Original Longshoremen's Act, Which the Courts Construed as Embodying the "Maritime But Local" Exception to National Uniformity, Resulted in Confusion Over the Scope of the Act Which This Court Sought to Dispel by Later Decisions.**

In early cases applying the Act, Section 3(a)'s limitation on coverage was viewed by some courts to express a congressional intent to incorporate the "maritime but local" exception as the test for federal coverage. *E.g., New Amsterdam Casualty Co. v. McManigal*, 87 F. 2d 332 (2d Cir. 1937); *see Crowell v. Benson*, 285 U. S. 22, 39-40 (1932). This created an insoluble jurisdictional

9. This interpretation is supported by the legislative history to the second aborted attempt by Congress to cover maritime workers discussed at p. 27, *supra*. The committee reports show that Congress would have preferred uniformity of coverage, albeit under state law, irrespective of whether an injury occurred on land or over the water. That Congress made no attempt to achieve this uniformity through a federal statute in 1927 suggests it may have felt the limits on its admiralty power prevented it from doing so.

dilemma due to the difficulty in determining whether an injury on the navigable waters fell within the "maritime but local" exception such that state law could apply, to the exclusion of the Longshoremen's Act. To alleviate this intolerable situation, this Court adopted the theory that, in marginal cases, presumptive weight would be given to the jurisdictional decisions of the appropriate state or federal authorities hearing the claim in the first instance. *Davis v. Washington Department of Labor and Industries,* 317 U. S. 249 (1942).

Thus developed the "twilight zone" doctrine which permitted the states to apply their compensation laws to claims falling close to the *Jensen* line but arguably on the side of the line where federal jurisdiction had previously been thought to be exclusive. This doctrine was rooted in the construction of the language of Section 3(a) as creating mutually exclusive state and federal compensation schemes, but it recognized that the difficulty in defining the precise line of demarcation demanded that some leeway exist to prevent a situation where no recovery, state or federal, was available.

Because even the "twilight zone" doctrine was insufficient to end the jurisdictional disputes created by the "if recovery . . . may not validly be provided by State law" limitation,[10] this Court reexamined prior interpretations in *Calbeck v. Travelers Insurance Co.,* 370 U. S. 114 (1962). In the two cases before the Court in *Calbeck,* maritime

10. After *Davis* many decisions from both federal and state courts continued to deny benefits on the basis that the claim had been brought under the wrong statute since jurisdiction was exclusive under the other act. *E.g., Noah v. Liberty Mutual Insurance Co.,* 267 F. 2d 218 (5th Cir. 1959); *Chappell v. C. D. Johnson Lumber Corp.,* 216 F. 2d 873 (9th Cir. 1954); *Ellis v. Travelers Insurance Co.,* 241 La. 433, 129 So. 2d 729 (1961); *Gaddies v. Trenton Marine Terminal, Inc.,* 86 N. J. Super. 125, 206 A. 2d 180 (1965); *Warner v. Travelers Insurance Co.,* 332 S. W. 2d 789 (Tex. Civ. App. 1960).



workers injured while engaged in shipbuilding activities on uncompleted vessels floating in the navigable waters were accorded benefits under the Longshoremen's Act by a deputy commissioner. These awards were overturned by the United States Court of Appeals for the Fifth Circuit because these claims plainly fell within the "maritime but local" exception. Indeed, they were factually indistinguishable from *Rohde* itself.

In reversing the court of appeals, this Court reviewed the legislative history of the 1927 Act and held:

> We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which *Jensen, Knickerbocker* and *Dawson* had rendered questionable the availability of a state compensation remedy. Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.

370 U. S. at 126-27 (footnotes omitted).

The key to the Court's holding is found in the following language, quoted with approval in *Calbeck,* from an earlier court of appeals decision, *DeBardeleben Coal Corp. v. Henderson,* 142 F. 2d 481, 483-84 (5th Cir. 1944):

> It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision "if recovery . . . may not validly be provided by State

> law" was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. . . . In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them.

370 U. S. at 130-131.

Thus, *Calbeck* adopted the interpretation that the limitation in Section 3(a) was inserted merely as an exercise of caution by Congress to insure that it did not exceed its legislative power in admiralty. Since, as *Calbeck* discussed, that power plainly extended to the water's edge, a remedy under the Act was always available for injuries occurring on the navigable waters irrespective of the power of the states under the "maritime but local" exception.

*Calbeck* was read as creating an area of concurrent jurisdiction where both state and federal law may operate. While this may have been the practical effect of the decision, the Court's reasoning certainly does not compel such a result. Indeed, had the *Calbeck* gloss of Section 3(a) been adopted shortly after the Act's passage, it is likely that federal and state jurisdiction would have been held to



meet, but not overlap, at the bright line of the water's edge. By 1962, however, the Court was apparently reluctant to overrule 35 years of precedent applying the "maritime but local" doctrine lest any further confusion be generated.

Given *Calbeck's* conclusion that Congress intended to exercise in full its admiralty jurisdiction over injuries occurring on the navigable waters, it is not surprising that maritime workers sought to push the scope of federal coverage beyond the water's edge to recover for land-based injuries, consistent with decisions in other cases where the Court had recognized a broadening of the geographical reach of the maritime law. *E.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943). The United States Court of Appeals for the Fourth Circuit held such coverage existed for injuries to longshoremen on a dock, on the strength of *Calbeck*, in *Marine Stevedoring Corp. v. Oosting*, 398 F. 2d 900, 905 (4th Cir. 1968):

> [W]e need only repeat Judge Palmieri's observation in Michigan Mutual Liability Co. v. Arrien, 233 F. Supp. 496, 501 (S. D. N. Y. 1965), aff'd 344 F. 2d 640 (2 Cir. 1965), that "[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction."
>
> This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority.

> Again, in the words of Judge Palmieri, "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction.'"

This Court was not prepared to go so far, however, and it reversed the court of appeals in *Nacirema Operating Co. v. Johnson*, 396 U. S. 212 (1969). While the *Nacirema* Court recognized Congress' power to cover maritime workers injured on land, it concluded that this power had not been exercised in 1927 when the Longshoremen's Act was passed.

### D. In 1972 Congress Deleted the Limitation on Coverage in Section 3(a) and Thereby Created a Uniform and Exclusive Federal Compensation Remedy for Maritime Workers.

The Congress which passed the 1972 amendments to the Longshoremen's Act, unlike its counterpart in 1927, was not timid in the exercise of its legislative power in admiralty nor concerned merely with filling a gap in the coverage of state compensation statutes. It intended to enact a uniform compensation system for all maritime workers without reference to the competence of the states to provide a remedy for some of those workers. To make its intention crystal clear, it deleted that language from Section 3(a) which had created this impediment to uniform coverage for maritime workers seaward of the water's edge prior to 1972.

It has been suggested that this deletion was meaningless because *Calbeck* had effectively written this language out of the Act. This suggestion is without merit. In the first place, "It is an accepted canon of statutory construction that where Congress had advertently changed the legislative language the change must be given effect."



*United States v. Guthrie*, 387 F. 2d 569, 571 4th Cir. (1967). *Accord, Central Bank, N. A. v. Federal Home Loan Bank of San Francisco*, 430 F. Supp. 1080, 1085 (N. D. Cal. 1977). If *Calbeck* had truly nullified this language, the fact that Congress still felt it necessary to remove it speaks eloquently to Congress' intention to place the Longshoremen's Act on a wholly new footing removed from the "Serbonian bog"[11] into which the original Act had fallen.[12] Moreover, the deletion of the language comes in the context of amendments extending the coverage of the Act to land, where state compensation laws were valid and pervasive and where the force of *Calbeck's* rationale anchored to maritime tort jurisdiction would be uncertain. Thus, Congress could only be certain of the amended Act's exclusive application to land-based injuries, as well as those occurring over the navigable waters, if it eliminated the language suggesting the possibility that state law could provide a remedy to injured maritime workers as well. This deletion, when combined with the other affirmative statutory evidence of Congress' purpose to create a uniform federal remedy to the exclusion of the states, leads to the ineluctable conclusion that the 1972 amendments preempted state law.

The Commonwealth Court's holding that concurrent jurisdiction is appropriate under the amended Act because a concept of concurrent jurisdiction had developed in pre-1972 decisions such as *Calbeck* is also wholly unwar-

11. *Johnson v. Texas Employers Insurance Association*, 558 S. W. 2d 47, 54 (Tex. Civ. App. 1977) (Keith, J., dissenting).

12. To be sure, Congress was apparently gratified by *Calbeck's* recognition of the breadth of its legislative authority in maritime matters. However, *Calbeck*, to the extent it appeared to reserve the possibility that state law could also affect and limit a maritime worker's compensation under some theory of concurrent jurisdiction, did not nullify the proviso and stood in the way of Congress' goal of providing a comprehensive, uniform federal remedy.

ranted.[13] *Calbeck*, in combination with *Nacirema*, represented a practical attempt to rationalize the borderline between federal and state coverage at the water's edge and vindicate the *Jensen* uniformity principle. The necessity for attempting to effect this solution by judicial interpretation ended in 1972 when the language which had resulted in the adoption of the gerrymandered *Jensen* line of demarcation was deleted. Congress wiped the slate clean and replaced that undiscernible line with a precise definition of coverage based upon the status of the worker and the situs of the injury, wholly irrespective of the competence of the states to provide a remedy for any injury now covered. *See Weyerhaeuser Co. v. Gilmore*, 528 F. 2d 957, 960 (9th Cir.), *cert. denied*, 429 U. S. 868 (1976) ("[T]he 1972 Amendments to the pertinent sections of [the Longshoremen's Act] eliminate the gray areas of jurisdiction under the former statute and place a clear line of demarcation between those employees entitled to benefits of federal compensation and those entitled to recover under state law."). To be sure, there may be questions whether a particular claim near the edge of the expanded federal coverage falls under the Longshoremen's Act. But the possibility that such questions may be presented in other cases cannot defeat the exclusivity of the federal remedy under the Longshoremen's Act in the cases at bar.

13. Similar reasoning appears in those decisions from other state courts which have applied state compensation statutes to claims within the coverage of the Longshoremen's Act. *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche*, 434 U. S. 803 (1977); *Umbehagen v. Equitable Equipment Co.*, 329 So. 2d 245 (La. Cir. Ct. App.), *writ of review denied for lack of final judgment*, 333 So. 2d 241 (La. 1976); *Johnson v. Texas Employers Insurance Ass'n*, 558 S. W. 2d 47 (Tex. Civ. App. 1977). In any event, decisions interpreting the original Act cannot be relied upon to defeat Congress' manifest intention to establish a uniform federal compensation system for maritime employees.



In short, Congress has removed the language from Section 3 of the Act which caused the intolerable jurisdictional dilemma leading to the *Calbeck* decision. In so doing, it has also removed the fetters which had prevented, and might have continued to prevent, the full exercise of the presumption of the Act's coverage in Section 20(a), 33 U. S. C. § 920(a), and the judicial principle of bringing doubtful claims within the Act's expansive jurisdiction. *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, 268 (1977). The rationale for concurrent jurisdiction, therefore, no longer exists, and the pre-1972 decisions are not relevant to determining Congress' intent in enacting the 1972 amendments to the Longshoremen's Act.

## V. The Legislative History of the 1972 Amendments to the Longshoremen's Act Plainly Evidences a Congressional Intent to Preempt State Law With a Uniform Federal Compensation Scheme for Maritime Workers.

Congress' intention to preempt state compensation statutes for injuries within the coverage of the amended Longshoremen's Act becomes even more plain when the legislative history of the 1972 amendments is examined. The reports of both Houses of Congress accompanying the legislation which became the 1972 amendments are identical in their discussion of the major provisions of the legislation. S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) (the "Senate Report"); H. R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) (the "House Report"). The Senate Report, however, begins with a summary of the legislation not found in the House Report:

> The principle [sic] purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, *extend cover-*

*age to protect additional workers,* provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms.

Senate Report at 1 (emphasis supplied). Thus, the expansion of coverage of the Act was one of the primary reasons for the passage of the amendments. The purposes of this expansion are set forth in the reports as follows:

EXTENSION OF COVERAGE TO SHORESIDE AREAS.

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. *The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.*

*To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate;* even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages.

* * *

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.



*It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land.* It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

*The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water.* Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel.

*The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.* . . .

Senate Report at 12-13; House Report at 10-11, *reprinted in* [1972] U. S. CODE CONG. & AD. NEWS 4698, 4707-08 (emphasis supplied).

This quotation shows that two objectives were paramount in Congress' judgment: adequacy of benefits and uniformity of coverage. Congress recognized that, "if State laws are permitted to continue to apply to injuries occurring on land," while benefits under the Longshoremen's Act were increased, the results would be twofold: 1) a disparity of benefits among maritime workers depending upon the situs of injury; and 2) an almost certain inadequacy of benefits for workers covered by state law. Congress prevented these undesirable results by invoking its admiralty power to expand federal coverage and to exclude state law.

As the reports show, Congress was well aware that state law was applicable to injuries on land only because Congress "permitted" state law to operate despite the maritime nature of those injuries. In 1972 Congress withdrew that permission. The principles of *Jensen* were brought to bear in 1972 when Congress expressed its intent "to permit a *uniform* compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." [14] *Jensen* precluded application of state law at a time when neither Congress nor the general maritime law provided a compensation remedy for maritime workers. Its holding is even more applicable here where Congress has expressly announced both the substance and scope of the uniform maritime law.[15]

14. The Committees' choice of the word "permit" does not undercut the intention to enact a uniform and exclusive federal compensation system for maritime workers. In this context, the word relates to Congress' efforts to remove the impediments in the original Longshoremen's Act which precluded the uniformity sought. In so doing, Congress intended to allow the uniformity principle of *Jensen* to operate for all maritime workers.

15. The remaining legislative history of the 1972 amendments is fully consistent with the goals of adequacy and uniformity expressed in the Committee Reports. The reported debates on the floor of the House of Representatives contain comments by Repre-



As is shown by this legislative history, Congress made a judgment in 1972 as to the circumstances under which maritime workers are to recover compensation benefits and further determined what level of benefits is adequate. This judgment was based upon a full consideration and balancing of the particular needs of the longshoring and shipbuilding industries and the persons employed in those industries. The states simply are not free to second-guess Congress by applying compensation statutes which embody legislative judgments different from those of Congress.

## VI. The Dominant Federal Interest in Providing a Uniform Compensation System for Maritime Workers, Coupled With the Complete Remedy Provided in the Longshoremen's Act, Fully Supports a Finding of Preemption.

As *Jensen* and its progeny amply demonstrate, the need for uniformity in maritime matters has resulted in a dominant federal interest in defining the substantive law which will apply to such matters. When this dominant federal interest is expressed in legislation such as the Longshoremen's Act, which not only defines the substantive maritime law but which also states the procedure for vindi-

15. (Cont'd.)
sentative Steiger of Wisconsin, a member of the House Committee which reported the bill, stating that the extension of coverage "is designed to correct [the] disparity" resulting from the limited coverage of the original Act. 118 Cong. Rec. 299 (1972). In the congressional hearings the testimony of representatives of labor and industry shows general support for the extension of coverage of the Act. *Hearings on S. 2318, S. 525 and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 73-74, 176-77 (1972) (statements of Howard McGuigan (AFL-CIO) and Ralph Hartman (Bethlehem Steel Corp.)); *Hearings on H. R. 247, H. R. 3505, H. R. 12006 and H. R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 297 (1972) (statement of Joseph Leonard (International Longshoremen's Ass'n)).

cation of the rights created, precisely defines the remedies available and provides a specialized tribunal vested with exclusive jurisdiction to hear claims thereunder, the states cannot interfere with the congressional scheme.

As this Court stated in *Hines v. Davidowitz*, 312 U. S. 52 (1941), discussing the area of foreign affairs which, like maritime matters, is imbued with a dominant federal interest:

> It cannot be doubted that both the state and the federal registration laws belong "to that class of laws which concern the exterior relation of this whole nation with other nations and governments." Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

312 U. S. at 66-67 (footnotes omitted).

Surely, Congress can elect to act in a limited fashion which allows continued state regulation when it exercises its legislative power in matters of a maritime nature, and this Court has recognized those limitations when they exist.[16] No such limitations are present in the Longshore-

16. *E.g., Askew v. American Waterways Operators*, 411 U. S. 325 (1973) (Water Quality Improvement Act did not preempt



men's Act, and it would be hard to imagine a more complete and pervasive scheme of regulation. Every facet of the relationship between an employer and employee once an employment-related injury occurs is spelled out in careful detail. For example, not only does Section 7 of the Act, 33 U. S. C. § 907, provide that the employer must furnish medical treatment to the injured employee, it also states the manner in which attending physicians are chosen and the extent to which the Department of Labor must supervise the treatment rendered. Similarly, Section 10, 33 U. S. C. § 910, precisely describes the method for calculating the claimant's average weekly wage, including alternative methods if those provided cannot reasonably and fairly be applied or if the claimant is a minor. Equally complete are the procedural provisions of the Act which state, *inter alia*, how and when notice of an injury is to be given (Section 12, 33 U. S. C. § 912), when claims must be filed (Section 13, 33 U. S. C. § 913), how claims are to be processed (Section 19, 33 U. S. C. § 919) and how administrative and judicial review of compensation orders may be obtained (Section 21, 33 U. S. C. § 921). The Longshoremen's Act "is virtually a cradle-to-grave act once an injury triggers its application." *Johnson v. Texas Employers Insurance Ass'n*, 558 S. W. 2d 47, 55 (Tex. Civ. App. 1977) (Keith, J., dissenting).

16. (Cont'd.)
state law regarding recovery of oil spill cleanup costs because federal act expressly allowed state regulation); *Kelly v. Washington*, 302 U. S. 1 (1937) (Motor Boat Act did not preempt state law providing for inspection and regulation of certain tug boats because those boats were not in the class of vessels covered by the Act); *cf. Rodrigue v. Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969) (state law provided rule of decision in wrongful death action for deaths occurring on drilling rigs off Louisiana coast because Congress had expressly incorporated state law in Outer Continental Shelf Lands Act rather than adopting admiralty rules set forth in Death on the High Seas Act).

Despite the completeness of the remedy provided by the Longshoremen's Act, the Commonwealth Court concluded that state law is not preempted with respect to claims which fall within the Act's coverage because there may exist some other maritime worker not before the Court who would not be covered by the Longshoremen's Act. 41 Pa. Commw. at 308, 398 A. 2d at 1114 (J. S. App., pp. A6-A7). This reasoning is simply wrong. The fact that there is an outer limit to the coverage of the Longshoremen's Act is not and cannot be probative of Congress' intent to provide an exclusive federal remedy for claims of maritime employees to which the Act applies. The coverage limits are a recognition that Congress' constitutional power to define the maritime law is itself limited to maritime matters, but within that scope its power is paramount. *See O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 40-41 (1943).

The very nature of our constitutional system, granting express powers to the federal government and reserving the remaining powers to the states, necessarily results in situations where federal and state authority meet at some point. The fact that the dividing line may not always be precise does not detract from Congress' power to supersede state law when it determines a matter within its sphere should be subject to nationally uniform regulation.

An especially pertinent example of an exercise of congressional power to create an exclusive federal remedy for a limited class is the Federal Employers' Liability Act ("FELA"), Act of Apr. 22, 1908, ch. 149, 35 Stat. 65, 45 U. S. C. §§ 51-60. Prior to the enactment of the FELA, recovery for occupational injuries for all railroad workers was governed by state law. Exercising its power to regulate interstate commerce, however, Congress created a



federal compensation system which rendered common carriers liable for injuries caused to employees engaged in interstate commerce resulting from the negligence of the carrier or its officers, agents or employees. Thus, by definition, those railroad employees engaged solely in intrastate commerce are not covered by the FELA.

For many years the courts struggled with the difficulty in determining on which side of the line separating federal and state coverage a particular claim fell. *E.g., Erie R. R. Co. v. Collins,* 253 U. S. 77 (1920); *Shanks v. Delaware, Lackawanna & Western R. R. Co.,* 239 U. S. 556 (1916). Despite these problems of demarcation, it was never doubted that the FELA provided the exclusive remedy for injured railroad employees covered thereby. *New York Central R. R. Co. v. Winfield,* 244 U. S. 147 (1917); *Second Employers' Liability Cases,* 223 U. S. 1, 53-55 (1912).

Like the Longshoremen's Act, the FELA expressly makes the liability imposed thereunder mandatory. The FELA does not, however, contain language similar to that in Section 5 of the Longshoremen's Act which renders that liability exclusive of all others. Moreover, the FELA only imposes liability for negligence and does not expressly cover liability without fault, which is the typical liability imposed by workers' compensation statutes. Nevertheless, this Court held in *New York Central R. R. Co. v. Winfield,* 244 U. S. 147 (1917), that railroad employees could not elect the remedy otherwise available under state compensation statutes when the FELA applied, reasoning as follows:

> Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their em-

ployees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania,* 16 Pet. 539, 617, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

244 U. S. at 153-54. *Accord, Erie R. R. Co. v. Winfield,* 244 U. S. 170, 174 (1917) ("It is beyond the power of any State to interfere with the operation of [the FELA], either by putting the carriers and their employees to an election between its provisions and those of a state statute or by



imputing such an election to them by means of a statutory presumption.").

This reasoning applies with even greater force to the Longshoremen's Act which expressly provides that liability thereunder is exclusive and which affirmatively provides a federal liability not based upon concepts of fault or negligence. Because the FELA liability is based solely on the carrier's negligence, it was argued that a state still has an independent interest in protecting its workers with an additional no fault remedy. That interest, which was held insufficient to override the congressional purpose in *Winfield,* does not even come into play here because it is already fully satisfied by the Longshoremen's Act.

Thus, the only state interest which is arguably served by allowing state law to apply to claims covered by the Act is the interest in having compensation claims processed under the particular substantive and procedural provisions of the state law. This is precisely the kind of parochial interest which must yield to the dominant federal interest in providing a uniform federal remedy for all maritime workers. Congress has determined how best to compensate maritime workers for work-related injuries, and it is no longer open to the states to decide that the federal system is inadequate or otherwise inappropriate, or to supplant that system with its own compensation statute, under the guise of complementing the federal scheme.

## VII. The Application of State Law to Claims Within the Coverage of the Longshoremen's Act Directly Conflicts With the Act.

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray v. Atlantic Richfield Co.,* 435 U. S. 151, 158 (1978). The decisions from the state courts holding jurisdiction

under state compensation statutes to be concurrent with that under the Longshoremen's Act have either rejected this principle entirely, *Poche v. Avondale Shipyards, Inc.* (*"Poche"*), 339 So. 2d 1212, 1215 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche,* 434 U. S. 803 (1977), or simply ignored it. *Sun Shipbuilding & Dry Dock Co. v. Workmen's Compensation Appeal Board,* 41 Pa. Commw. 302, 398 A. 2d 1111 (1979) (J. S. App., pp. A1-A10); *Johnson v. Texas Employers Insurance Ass'n.* (*"Johnson"*), 558 S. W. 2d 47 (Tex. Civ. Ct. App. 1977); *Murray v. City of Augusta,* 394 A. 2d 1171 (Me. 1978).[17] Both the Longshoremen's Act and the various state statutes create complete remedial systems, however, and conflict necessarily arises at virtually every level because the rights granted and responsibilities imposed are different.

It may be argued that the conflict between the Act and a state compensation statute ends at the time the claimant elects which remedy he will pursue. Such an argument ignores the fact that differing obligations are imposed upon employers under the Longshoremen's Act and the Pennsylvania Act (along with most other state acts) prior to the time any such election is made, and substantial penalties may occur if these obligations are not met.[18]

17. The Louisiana Circuit Court of Appeals did recognize the possibility of a conflict in *Umbehagen v. Equitable Equipment Co.* (*"Umbehagen"*), 329 So. 2d 245, 251, *writ of review denied for lack of final judgment,* 333 So. 2d 241 (La. 1976), but concluded there is not "such a conflict between the federal and state acts that the two acts cannot consistently stand together." Of course, the *Poche* decision by the Louisiana Supreme Court, which rejects the principle of *Ray* entirely, is the ultimate word from the Louisiana courts.

18. *Compare* Longshoremen's Act § 30, 33 U. S. C. § 930 (requiring the filing of a report of injury with the Department of Labor and imposing a civil penalty of $500.00 for failure to file), *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 994 and § 991(d) (Purdon Supp. 1979-80) (requiring a report of injury to be filed



Conflicts also arise when an employer determines to pay compensation without an award. Under both the Longshoremen's Act and the Pennsylvania Act, the basic amount of compensation payable is 66 and ⅔ percent of the employee's pre-injury weekly wages. The methods for determining weekly wages and the maximum weekly amounts payable are entirely different under the two statutes, however. *Compare* Longshoremen's Act § 10, 33 U. S. C. § 910, *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 582 (Purdon Supp. 1979-80). To further complicate matters, the number of weeks of benefits payable for scheduled disabilities differs substantially. *Compare* Longshoremen's Act § 8(c), 33 U. S. C. § 908(c), *with* Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 513 (Purdon Supp. 1979-80). How is an employer to determine what amount should be paid each week or for how many weeks that amount should be paid? Claimants would no doubt argue that the employer should apply the system which results in the greatest recovery, while employers would be expected to favor the system which provides the least. The command of the Supremacy Clause prohibits such a result, however. *See P. C. Pfeiffer Co. v. Ford,* 100 S. Ct. 328, 338 (1979) ("Congress did not intend the Act's coverage to shift with the employer's whim.").

At almost every point where the Longshoremen's Act and the Pennsylvania Act speak to a particular issue, be it substantive, procedural or remedial, some type of conflict surfaces. Until such time as the claimant makes

18. (Cont'd.)
with the Pennsylvania Department of Labor within three days of the date of injury and allowing imposition of a penalty not exceeding ten percent of the amount of benefits for failure to file). *See generally* Note, *Journey Into the Twilight Zone,* 23 LOYOLA L. REV. 504, 517-18 (1977) (arguing for exclusive federal jurisdiction on the ground that the Act's regulatory plan conflicts with the Louisiana regulatory plan).

the election which the court below says he is entitled to make, those conflicts must be resolved in favor of the provisions of the Longshoremen's Act.[19] Yet the claimant can completely reverse the process by electing state coverage with all of its own peculiarities and limitations, possibly subjecting the employer to penalties.

The Texas court in *Johnson* justified this anomalous result by suggesting that state law merely supplements the remedy provided by the Longshoremen's Act rather than conflicting with it. 558 S. W. 2d at 51. As a practical matter, such supplementation is a total displacement of federal law. The election to proceed under state law results in an adjudication by the state tribunal charged with the administration of that law, which is bound to follow the procedures specified in the state statute from which it derives its authority to hear compensation claims. Moreover, it is unlikely that such a tribunal could or would apply the substantive provisions of the Longshoremen's Act, supplementing its provisions with those of state law when this would benefit the claimant. Such a result was expressly foreclosed by the Louisiana Supreme Court in *Poche,* where it concluded that an election under state law requires that the whole body of state law be applied to the exclusion of the Longshoremen's Act even when the two laws are in direct conflict. 339 So. 2d at 1221.

Indeed, the *Poche* court recognized that the only reason a claimant would make such an election would be to avail himself of the substantive differences between state and federal law:

> That the provisions of the state and federal compensation laws with respect to third party negligence

19. This result is compelled by the Supremacy Clause, unless the employer also has a right of election, but none of the state cases have gone this far. *But see* Justice Keith's dissent in *Johnson,* 558 S. W. 2d at 55, suggesting that an employer must also have a right of election if jurisdiction is truly concurrent.



> actions are different cannot be disputed. We are of the opinion, however, that once the initial determination was made that the LHCA and state compensations statutes could operate concurrently, the appeal court was in error to reexamine the question of state-federal conflict with respect to particular provisions of the acts. It is obvious that unless the state statute provides benefits or rights beyond those accorded by federal law, there would be no reason to elect to pursue the state remedy. To hold, as did the appellate court, that a plaintiff may elect state law but only insofar as the rights accorded thereunder do not exceed those provided in the federal scheme is to render meaningless the right to make the initial election.

339 So. 2d at 1221. Thus, the very conflict which precludes the operation of state law under the Supremacy Clause is advanced as a justification for concurrent jurisdiction.

A slightly different explanation of the supplementary nature of state law is found in *Umbehagen* where the court concluded that "Achievement of [Congress'] purpose [in enacting the 1972 amendments], however, does not require exclusion of state power to provide a *more favorable remedy.*" 329 So. 2d 249 (emphasis supplied). If this statement means that state law does not conflict with the Longshoremen's Act, and therefore may be constitutionally applied, only when it is more favorable to the claimant, the result would be a jurisdictional dilemma far worse than that which existed during the early years of the original Longshoremen's Act.

Under the *Umbehagen* rationale, a state could assert jurisdiction under its compensation statute only after it

concluded that the state system would be more favorable to the claimant. Establishing this fact would require examination not only of the benefit levels under the competing systems, but also of the full range of substantive and procedural provisions to insure that a higher benefit level under state law (if it exists) is not rendered unavailable by some other provision which constrains the right to recover those benefits.

The impracticality of such an analysis is demonstrated by the cases now before the Court. Under Section 8(c)(20) of the Longshoremen's Act, 33 U. S. C. § 908(c)(20), compensation for facial disfigurement is limited to $3,500 while the Pennsylvania Act, Pa. Stat. Ann. tit. 77, § 513 (Purdon Supp. 1979-80), permits recovery for disfigurement of 66 and ⅔ percent of wages for up to 275 weeks. This potential for a greater dollar recovery must be weighed, however, against the fact that the standards for establishing a compensable disfigurement under the Pennsylvania Act are more stringent than those under the Longshoremen's Act.

Compensation under the Longshoremen's Act is available for "serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment." 33 U. S. C. § 908(c)(20). The Benefits Review Board has read the two clauses of this subsection disjunctively so that disfigurement of the face, head or neck is compensable when found to be "serious" irrespective of any other consideration. *Brysiak v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 197 (1975).

In sharp contrast to this single standard of compensability under the Longshoremen's Act, the Pennsylvania Act states four requirements which must be met before compensation is awarded. The disfigurement must



be: (1) serious; (2) permanent; (3) of such a character as to produce an unsightly appearance; and (4) such as is not usually incident to the employment. Pa. Stat. Ann. tit. 77, § 513(22) (Purdon Supp. 1979-80); *Workmen's Compensation Appeal Board v. Fruehauf Corp.*, 23 Pa. Commw. 466, 353 A. 2d 63 (1976). Thus, it is far from clear that the Pennsylvania Act is in fact more favorable to a worker suffering a disfigurement of the head, face or neck, and it provides no remedy for a disfigurement of other normally exposed areas of the body.[20]

Beyond the practical and undesirable difficulties of engaging in such an analysis every time a claim is filed, this result plainly contravenes the Supremacy Clause. As this Court held in *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 236 (1947), when Congress regulates a subject within its constitutional powers, "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Accord, New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 152 (1917). When Congress passed the 1972 amendments to the Longshoremen's Act, it expressed its judgment as to the appropriate system for compensating maritime workers for disfigurement as well as other occupational injuries. If a

20. None of the claimants here were awarded benefits at or near the $3500 limit on disfigurement awards under the Longshoremen's Act, 33 U. S. C. § 908(c)(20). The referee awarded $570.00 to April, $530.00 to Januzciewicz, $1,140.00 to Kimmel, and $800.00 to Moore. (J. S. App., pp. A57, A64, A68, A72). The Workmen's Compensation Appeal Board, upon reversing the dismissal of Fields' claim by the referee, awarded him $1,500. (J. S. App., p. A32). In each case the referee or the Board approved counsel fees equal to 20% of the compensation award to the claimant's attorney payable out of the compensation awarded. (J. S. App., pp. A32, A57, A64, A68, A72). Under Section 28(a) of the Longshoremen's Act, any attorney's fee approved is payable by the employer separately and not charged against the award. 33 U. S. C. § 928(a).

conflicting state law system, be it more or less favorable, is allowed to operate concurrently, that law will necessarily "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978), *quoting Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

The obstacle to the accomplishment of Congress' purpose which concurrent jurisdiction creates has already manifested itself in cases subsequent to the 1972 amendments where claimants have initially chosen their state remedies and then sought recovery under the Longshoremen's Act. *Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F. 2d 1273 (4th Cir. 1978), *cert. denied*, 440 U. S. 915 (1979), *aff'g Jenkins v. Newport News Shipbuilding & Dry Dock Co.*, 6 BRBS 133 (1977); *Landry v. Carlson Mooring Service*, 9 BRBS 518 (1978), *appeal pending*, Nos. 79-1274, 79-1479 (5th Cir.). *See Pettus v. American Airlines, Inc.*, 587 F. 2d 627 (4th Cir. 1978), *vacating* 6 BRBS 461 (1977) (involving the District of Columbia Workmen's Compensation Act, which incorporates the substantive provisions of the Longshoremen's Act). Each of these cases recognizes that the pursuit of a claim under the Longshoremen's Act after some type of state proceedings have occurred presents thorny issues of *res judicata*, collateral estoppel, election of remedies and full faith and credit. The various opinions, however, present a bewildering array of approaches to solving these issues which points to a dilemma no less complex or insoluble than that which developed in the area of coverage under the original Longshoremen's Act.

In *Landry*, a majority of the Benefits Review Board reluctantly concluded that application of principles of *res judicata* and election of remedies to the facts before it precluded a claimant who had recovered $20,000 in settlement of a claim under the Texas compensation statute from



claiming under the Longshoremen's Act, where his benefits might have exceeded $250,000. As Boardmember Miller stated in his vigorous dissent, "The practical effect of today's ruling is to hold that a judgment in Texas can nullify a Federal statute which Congress passed for Claimant's protection." 9 BRBS at 528.4. The dissent further recognized that the majority's result is avoided when full effect is given to the congressional intent to supersede state law by enacting the 1972 amendments to the Act:

> Is the Longshoremen's and Harborworkers' Compensation Act the exclusive remedy for an injury sustained by a maritime employee working upon the navigable waters? If so, then not only must the state rule of *res judicata* yield to the superior interest of the federal government, but any action by the state on a maritime employee's compensation claim is void as beyond the state's constitutionally-restricted jurisdiction.
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> * * *
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> In light of these changes [the 1972 amendments] and the legislative history, I conclude that the Congress, through the 1972 Amendments, moved the *Jensen* line landward to cover maritime employees injured on what was formerly land-based areas. *Nacirema Operating Co. v. Johnson, supra. See also Victory Carriers Inc. v. Law*, 404 U. S. 202, 216 (1971).
>
> Therefore, claimant in the present case cannot have his federal remedy barred by any state proceeding since he clearly is covered by the Federal Act. State law must "yield to the needs of a uniform federal maritime system." *Thibodaux* [*v. Atlantic Richfield Co.*, 580 F. 2d 841, 847 (5th Cir. 1978)].

9 BRBS at 528.5, 528.7.

As long as the states are permitted to exercise a jurisdiction over the claims of some maritime workers concurrent with that under the Longshoremen's Act, results such as that achieved in *Landry* which defeat Congress' purpose to provide an adequate and uniform compensation system appear inevitable. Therefore, the Supremacy Clause demands that the remedy provided by the Longshoremen's Act be exclusive for claims such as these which fall within the Act's coverage.

## CONCLUSION.

For the foregoing reasons, the judgment of the Commonwealth Court of Pennsylvania affirming the award of benefits to the five individual appellees should be reversed, and the cause remanded with instructions to dismiss the claims under the Pennsylvania Workmen's Compensation Act for lack of jurisdiction.

Respectfully submitted,

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